IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0115

IN THE MATTER OF:

C.A.D. III,

A Youth In Need of Care.

# BRIEF OF APPELLEE

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable C.B. McNeil, Presiding

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## TABLE OF CONTENTS

**TABLE OF CONTENTS**
**(Cont.)**

## TABLE OF AUTHORITIES

## CASES

**TABLE OF AUTHORITIES**
**(Cont.)**



**OTHER AUTHORITIES**

**TABLE OF AUTHORITIES**
**(Cont.)**

## STATEMENT OF THE ISSUES

1. Did the District Court abuse its discretion in finding probable cause for DPHHS's Petition for Emergency Protective Services?

2. Did the District Court abuse its discretion in adjudicating the child as a youth in need of care and in denying the father's motion to dismiss?

3. Did the District Court abuse its discretion when it denied the father's motion to dismiss and, later, terminated the birth mother's parental rights?

4. Did the District Court abuse its discretion when it found that the State had proven the statutory criteria to terminate the birth mother's parental rights?

## STATEMENT OF THE CASE

J.K., the mother of C.A.D. III, has timely appealed the district court's order terminating her parental rights, Judge C.B. McNeil presiding. (D.C. Doc. 105.)

## STATEMENT OF THE FACTS

C.A.D. III was ten months old when he was removed from his mother's care. (D.C. Doc. 1.) DPHHS first became involved with C.A.D. III's parents in January, 2008 when he was four months old. (9/3/08 Tr. at 46.) DPHHS had received a

report that C.A.D. III's mother was witnessed shaking the baby, cussing and yelling at him, and not demonstrating basic parenting skills. (9/3/08 Tr. at 46.) Following the initial report, DPHHS met with C.A.D. III's mother in the home. Child Protection Specialist, Alice Phelan, testified that she had concerns for C.A.D. III's welfare, prior to and following the initial home visit. She testified that the house was overcrowded with people, there was an overflowing litter box, beer cans, and overflowing ashtrays, everywhere. (9/3/08 Tr. at 46-47.) There were also allegations of illegal drug use in the home, and it was reported that drug paraphernalia had been removed from the home. (9/3/08 Tr. at 48.) There were also concerns regarding domestic violence occurring in front of C.A.D. III.

The mother was referred to Family Concepts and other services including: Medicaid, parenting classes, and random urinalysis testing. (9/3/08 Tr. at 48.) Alice Phelan testified that in September 2007, she attempted to contact the father, C.A.D. Jr., but was unable to speak with him. She eventually sent him a letter urging him to participate in the services she had arranged for the mother. He never replied to the letter nor participated in any services. (9/3/08 Tr. at 47-48.) Family Concepts discharged the family from services in June 2008, for non-compliance. (9/3/08

Tr. at 52.)

At the Order to Show Cause Hearing, Theresa Neely, a friend of the mother's, testified that the mother and baby had stayed with her one night in June 2008. She testified that the following day the father came to her home and the parents had a verbal argument in front of the baby. The birth father picked up C.A.D. III, put him in his truck, and left. This was concerning to the birth mother and Ms. Neely because the baby was not secured in a car seat and was only nine months old at the time. Ms. Neely testified about a report she subsequently made in July 2008. She reported that C.A.D. III's mother was witnessed jumping out of the father's moving vehicle, with C.A.D. III in her arms. (9/3/08 Tr. at 52-53.) Ms. Phelan met with the mother to discuss this report and the mother expressed fear of the father. (9/3/08 Tr. at 53.) Following this report, Ms. Phelan prepared a Voluntary Protective Service Agreement (VPSA), which the mother signed. (9/3/08 Tr. at 53-54.) Ms. Phelan testified that she prepared the VPSA, rather than removing the child, because the mother was allegedly residing with her brother, and not with the birth father. The VPSA provided that the mother was to remain out of the father's residence due to domestic violence issues and that she would keep the baby with her in her brother's home. (9/3/08 Tr. at 53-54.) The mother also agreed to reengage the services Ms. Phelan had previously set up for her in January 2009. She further agreed that she would work with DOVES, a domestic violence agency. (9/3/08 Tr. at 54.)

The second time around, the father appeared and availed himself for an intake appointment with Family Concepts on July 9, 2008. (9/3/08 Tr. at 55.) At the same time, the mother had moved back in with the father but did not advise DPHHS. DPHHS was aware that the mother and baby were again residing with the father. Ms. Phelan met with the mother and discussed the mother's violation of the VPSA. The mother agreed to enter into another VPSA and agreed to place the baby with his paternal great grandmother, Erma Wall. (9/3/08 Tr. at 55.) Ms. Phelan testified that she learned a few days after this VPSA was entered into, that the baby had not been placed with Ms. Wall. (9/3/08 Tr. at 56.)

Following two violated VPSAs, continued parental illegal drug use, domestic violence, and the parents' lack of parenting skills, the child was removed from his parents' care and placed in protective custody on July 18, 2008. By the time the child was removed, DPHHS had been working with the mother for seven months.

DPHHS filed its Petition for Temporary Investigative Authority (TIA) and Emergency Protective Services (EPS) on July 25, 2008. (D.C. Doc. 1.) An Order to Show Cause Hearing was scheduled on August 20, 2008. The hearing was continued as a result of the father's filing a Motion to Dismiss. (8/20/08

Tr. at 3, 9.) On September 2, 2008, the Court found that the mother simply joined in the father's motion to dismiss, rather than filing her own motion to dismiss. (D.C. Doc. 20.) (9/3/08 Tr. at 51.)

The Court held a hearing on September 3, 2008 regarding the Father's Motion to Dismiss and heard testimony in support of DPHHS's Petition at that time. On September 18, 2008, the Court issued Findings of Fact and Conclusions of Law. The Court denied the father's motion to dismiss, based on the evidence presented at the hearing, and granted DPHHS TIA and EPS. (D.C. Doc. 28.) The father subsequently filed an appeal with this Court challenging the District Court's denial of his motion to dismiss. That appeal was dismissed as being inappropriate.

On October 22, 2008, the mother consented to DPHHS's Petition for TIA and EPS, through her attorney. She agreed to the following conditions: 1. attend parenting classes; 2. obtain a chemical dependency evaluation; 3. obtain a parenting assessment; 4. obtain a psychological evaluation; 5. attend the DOVES victim [local domestic violence program] classes; 6. maintain weekly contact with her social worker; 7. sign a release of information; 8. attend all visitations with her son; and 9. provide UA samples, as requested. (D.C. Doc. 39, at 2.)

The mother did not comply with the conditions she had agreed to in October 2008. DPHHS filed a Petition for Adjudication of the Child as a Youth in Need of Care and Temporary Legal Custody on January 16, 2009. (D.C. Doc 40.) An

adjudication hearing was held on March 11, 2009. DPHHS called the following witnesses: J.K., adversely; Cindy Hunter, a Family Support Worker with Family Concepts; Alice Phelan, Child Protection Specialist; and Ernie Wallen, C.A.D. III's guardian ad litem. The mother called no witnesses and provided no testimony. (3/11/09 Tr.)

Through J.K.'s testimony, it was established that J.K. was 15 at the time the father impregnated her with C.A.D. III, while C.A.D. Jr. was 29. (3/11/09 Tr. at 11). It was also established that, during a recent supervised visit, the mother had tested positive for marijuana and that the mother smoked marijuana with the father. (3/11/09 Tr. at 11-12.) The mother testified that if C.A.D. III were returned to her, she would continue to live with C.A.D. Jr. (3/11/09 Tr. at 13.)

Cindy Hunter testified that she provided urinalysis testing for the parents. She testified that in December of 2008 the mother had her first negative UA for marijuana. (3/11/09 Tr. at 22.) She further testified that in February of 2009 the mother again tested positive for marijuana. (3/11/09 Tr. at 22.) Ms. Hunter also testified that on January 26, 2009 the mother told Ms. Hunter that she had moved in with her sister to "make reunification move along faster." (3/11/09 Tr. at 23.) Ms. Hunter testified that the parents had missed several visits and that they had not completed parenting classes based on their inconsistent visitations. (3/11/09 Tr. at 24.)

At the adjudication hearing, the Court took judicial notice of Alice Phelan's prior testimony at the September 3, 2008 hearing, which detailed the reasons for the removal of C.A.D. III. The mother's attorney did not object. (3/11/09 Tr. at 42.) Ms. Phelan testified that there were three main reasons that C.A.D. III was in danger of abuse and neglect prior to, and up to, the time of the adjudication hearing on March 11, 2009. These reasons included: parental drug use, domestic violence in the home, and an outstanding need for parenting education. (3/11/09 Tr. at 52.) Ms. Phelan further testified that, since the State first became involved with the family in January 2008, the parents had made no progress in addressing the reasons for Department involvement. (3/11/09 Tr. at 52.) The District Court granted DPHHS's petition and adjudicated C.A.D. III as a youth in need of care, finding that DPHHS had established, by a preponderance of the evidence, that C.A.D. III was abused or neglected, or was in danger of being abused or neglected. (D.C. Doc. 52.)

On April 29, 2009, J.K. and her legal counsel signed a treatment plan, which was ordered by the Court on May 11, 2009. (D.C. Doc. 59.) The mother's treatment plan identified the nature of abuse and neglect as being "based on the parents' use of illegal drugs and the presence of domestic violence in the home as found by the Court in its Order dated March 25, 2009." (D.C. Doc. 59.) J.K. and her attorney voluntarily signed this treatment plan, which set forth the basis of

abuse and neglect. (D.C. Doc. 59.) At no time throughout the proceedings did J.K. object to the treatment plan.

On September 4, 2009, DPHHS filed a Petition for Permanent Legal Custody and Termination of Parental Rights, pursuant to Mont. Code Ann. § 41-3-609(1). DPHHS alleged that: C.A.D. III had been adjudicated a youth in need of care, the mother was unable or unwilling to complete her court ordered treatment plan, and the conditions or conduct rendering J.K. unfit were unlikely to change within a reasonable time. (D.C. Doc. 60.)

A hearing on DPHHS's Petition was held on February 5, 2010. The following testified on behalf of DPHHS: Dr. Paul Silverman, who performed a parenting assessment and psychological evaluation of J.K.; Theresa Oakland, a licensed addiction counselor who performed a chemical dependency evaluation of J.K.; Cindy Hunter, a Family Support Worker and UA Coordinator for Family Concepts; and Jake Leeper, Child Protection Specialist in the Intervention Unit for DPHHS. The birth mother testified on her own behalf and called no additional witnesses. (2/5/10 Tr.)

On February 10, 2010, the District Court entered its Findings of Fact, Conclusions of Law, and Order Terminating Birth Mother's Parental Rights. (D.C. Doc. 82.) In its Order, the District Court found that clear and convincing evidence was presented at the termination hearing, which established that: C.A.D. III had

been adjudicated as a Youth in Need of Care on March 25, 2009; an appropriate treatment plan was developed between the parties and ordered by the Court, which addressed the issues causing the child to be a youth in need of care; that the child had been outside of the home for 18 months; and that the birth mother did not comply with, nor complete, her treatment plan. The Court further found that Theresa Oakland, a licensed addiction counselor, testified that the birth mother was cannabis dependent but that her recovery environment was not supportive, as she continued to reside with C.A.D., Jr., who continues to use cannabis and alcohol. The Court also found that the mother had been inconsistent with visitation. The Court further found that the mother was inconsistent in maintaining contact with DPHHS and that the mother did not contact or complete intake with DOVES to address domestic violence. Jake Leeper testified that the mother had failed to establish a safe and stable living environment for herself and her child, and that she continued to reside with the father, although his rights had previously been terminated by the Court. The Court found that, based on Dr. Silverman's assessment and evaluation of the mother, as well as his testimony, the mother would require "considerable intervention in order to provide a stable home for the child." The Court held that the "conduct or condition of the mother rendering her unfit is unlikely to change within a reasonable time." The Court further found that

the Department had made reasonable efforts to reunite C.A.D. III with his mother, which included an appropriate treatment plan for the mother's completion. (D.C. Doc. 82.)

## STANDARD OF REVIEW

This Supreme Court reviews questions of law and fact, or issues, requiring the District Court's discretion, including a determination that a child is abused or neglected, or a decision to terminate parental rights, to determine if the District Court abused its discretion. In re D.H., 264 Mont. 521, 524, 872 P.2d 803, 805 (1994). "The test for an abuse of discretion is whether the trial court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice." Id. (Citing In re K.C.H., 2003 MT 125, ¶ 11, 316 Mont. 13, 68 P.3d 788). It is the appellant's burden to prove the district court abused its discretion. In re D.F., 2007 MT 147, ¶ 22, 337 Mont. 461, 161 P.3d 825.

"The standard of review of a district court's findings of fact in a parental termination case is whether the findings in question are clearly erroneous." In re K.C.H., 2003 MT 125, ¶ 15, citing In re P.E., 282 Mont. 52, 56, 934 P.2d 206, 209 (1997). "The standard of review of a district court's conclusions of law in such cases is whether its conclusions are correct." Id.

## SUMMARY OF THE ARGUMENT

DPHHS was correct in removing the child and requesting EPS and TIA. The District Court did not abuse its discretion in denying the father's Motion to Dismiss. The mother did not file a Motion to Dismiss, and *stipulated* to DPHHS's request for EPS and TIA. Clearly, there was probable cause to establish that C.A.D. III was in immediate or apparent danger of harm. Furthermore, the District Court heard ample evidence to find that C.A.D. III met the definition of an abused or neglected child. The District Court issued specific findings, defining the basis of C.A.D. III's abuse and neglect, or susceptibility of being abused or neglected, by a preponderance of the evidence. The chain of events which led to J.K.'s termination of parental rights was set off by her own actions and inactions from the day C.A.D. III was born, until her parental rights were terminated. There was no cumulative error. The mother's fundamental rights were not violated. Furthermore, the treatment plan that J.K. agreed to complete, upon advice of counsel, was appropriate and addressed her needs as well as her child's needs. J.K. refused to perform the tasks of her treatment plan, and it was J.K.'s actions that led to the termination of her parental rights. J.K.'s conditions or conduct which render her an unfit parent are unlikely to change within a reasonable amount of time and C.A.D. III's best interests are of paramount concern.

## ARGUMENT

### I. EMERGENCY PROTECTIVE SERVICES WERE NECESSARY TO PROTECT C.A.D. III.

J.K.'s fundamental rights were not violated when C.A.D. III was removed. Montana Code Annotated § 41-3-301(1) provides that: "any child protective social worker . . . who has reason to believe any youth is in immediate or apparent danger of harm may immediately remove the youth." While the mother argues that the danger present in the parents' household was insufficient to remove C.A.D. III, this argument is simply untrue. There was substantial evidence presented at the September 3, 2008 show cause hearing to establish that the parents' home posed a number of obvious dangers to C.A.D. III. The parents' home was unsanitary. The parents admittedly abused marijuana. And, there had been at least one confirmed report of partner family member assault involving C.A.D. III. As established at the order to show cause hearing, the mother and father were involved in a physical altercation while the father was driving and the mother was holding C.A.D. III. The father was grabbing the mother's hair and hitting her. Amidst this altercation, the mother jumped from the moving vehicle, while holding C.A.D. III. The mother reported she feared the father and the potential for additional assaults. She also reported the father had threatened to kill her if she left him.

The mother fails to acknowledge that Mont. Code Ann. § 41-3-301(2) specifically provides that if there has been an occurrence of partner family member

assault, DPHHS shall take appropriate steps to ensure the protection of the child. DPHHS has incorporated this statutory language into its policy manual, which the mother also cites, but ignores. That manual specifies that examples of cases which might require emergency removal include: instances where "the child is in danger because of the occurrence of partner or family member assault." (Emphasis supplied.) (Appellant's Br. at 11-12.) The mother had no ability to remove herself and C.A.D. III from the father, and the father posed a substantial risk of harm to the child, which meets the definition of child abuse and neglect, pursuant to Mont. Code Ann. § 41-3-102(7)(a)(iii).

J.K.'s attempted application of Rogers v. County of San Joaquin, 487 F.3d 1288 (9th Cir. 2007), is unsupported by the facts of this case. (App. Br. at 12-13.) In Rogers, the Ninth Circuit determined that no emergency existed to warrant removal of the children, because the Department left the children in the home for 18 days, following the reported abuse or neglect. In this case, DPHHS believed that the child would be endangered if left in the home without services, following the first report of abuse and neglect, and entered into a Voluntary Protective Services Agreement with the mother. In that Agreement, the mother agreed to live with the baby, apart from the father. Additionally, in Rogers, the social worker admitted that she could have easily obtained a warrant "within hours." Id. at 1295. In Montana, child protection specialists may remove children from their parents if

they form a reasonable belief that "any youth is in immediate or apparent danger." Mont. Code Ann. §41-3-301(1). J.K. was afforded due process, as provided for under Montana's child abuse and neglect statutes.

## II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE FATHER'S MOTION TO DISMISS.

The authority to remove children on an emergency basis is granted by Mont. Code Ann. § 41-3-301(1). The mother failed to file a Motion to Dismiss the Petition with the District Court, and the District Court correctly concluded that J.K. had only joined in the father's motion to dismiss. (D.C. Doc. 20; 9/3/08 Tr. at 51.) Because the mother failed to file a Motion to Dismiss the case, she should not be allowed to argue on appeal that the District Court erred in failing to dismiss the case. Regardless, and based on the father's Motion to Dismiss, while the father incorrectly argued that actual abuse or neglect is required to warrant removal, his argument ignored statute and case law. Montana Code Annotated § 41-3-102(7)(a)(ii) provides that a substantial risk of harm to a child's health or welfare constitutes child abuse or neglect. See In re K.C.H., 2003 MT 125, ¶ 19, 316 Mont. 13, 68 P.3d 788. The Court in K.C.H. was presented with the same argument made in the case at bar. In K.C.H., the father attacked the district court's order terminating his parental rights and unsuccessfully argued that the district

court should have denied the initial petition for TIA because the allegations were insufficient. The Court denied the father's argument, reasoning that:

> Appellant contends that actual, not prospective, abuse or neglect is required for a child to be deemed a "Youth in Need of Care." Appellant's argument, however, ignores the plain language of § 41-3-102(7)(a)(ii). This statute provides that a "substantial risk of harm to a child's health or welfare" constitutes child abuse.

Id. at ¶ 19. In another similar case, a mother appealed an order terminating her rights and argued that the Court abused its discretion in denying her Motion to Dismiss a Petition for TIA. This Supreme Court upheld the district court's rulings and orders, and explained that, pursuant to Mont. Code Ann. § 41-3-402, "a petition for temporary investigative authority and protective services must state the specific authority requested and the facts establishing probable cause that a youth is abused or neglected or in danger of abuse or neglect." In re D.T.H., 2001 MT 138, ¶ 11, 305 Mont. 502, 29 P.3d 1003. (Emphasis supplied.) In the case at bar, C.A.D. III was certainly at substantial risk of harm, given the issues present in his parents' relationship and his home environment. J.K. fails to mention that, in order to obtain emergency protective services and temporary investigative authority, DPHHS need only present facts sufficient to establish probable cause. Clearly, the Court did not abuse its discretion in awarding DPHHS emergency protective services and temporary investigative authority and in denying the father's Motion

to Dismiss, when DPHHS demonstrated, beyond probable cause, that C.A.D. III was in danger of being abused or neglected.

J.K.'s ability to raise this issue on appeal should also be precluded as she stipulated to DPHHS's Petition for EPS and TIA. (D.C. Doc. 39.)

## III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADJUDICATING C.A.D. III AS A YOUTH IN NEED OF CARE, AND THE DISTRICT COURT'S FINDINGS WERE LEGALLY SUFFICIENT.

The mother contends that the District Court's findings were insufficient to find that C.A.D. III met the definition of an abused or neglected child. As this Court has held:

> A youth in need of care is defined as "a youth who has been adjudicated or determined, after a hearing, to be or to have been abused or neglected." Section 41-3-102(23), MCA. An abused or neglected youth is one who has suffered child abuse or neglect. Section 41-3-102(3), MCA. "Child abuse or neglect" means:
>
> (i) actual harm to the child's health or welfare; or
>
> (ii) substantial risk of harm to a child's health or welfare.
>
> Section 41-3-102(7)(a), MCA.

D.T.H. at ¶ 10. The mother in D.T.H., as J.K., argued that her child did not meet the definition of an abused or neglected child. This Court disagreed with her, and concluded that: "DPHHS presented no evidence establishing abuse or neglect as a result of any actual harm to D.T.H., § 41-3-102(7)(a)(ii), MCA, provides that

abuse or neglect may be found where there is a substantial risk of harm to a child's health or welfare." Id. at ¶ 13.

The mother complains that the District Court did not make sufficient findings to support adjudication. To the contrary, the District Court's Order specifies the nature of abuse and neglect as including: "the parents' continued use of illegal drugs and the presence of domestic violence in the home." This finding was established at the adjudication hearing and was established through the testimony of more than one witness. The mother also complains that there were not enough witnesses testifying on behalf of the state, or that the witnesses' testimony was not strong enough to justify the District Court's order. However, as this Court has held on numerous occasions:

> In nonjury trials, the credibility of a witness and the weight which his or her testimony should be afforded is left to the sound discretion of the district court. Keebler v. Harding, 247 Mont. 518, 523, 807 P.2d 1354, 1357 (1991). In this case, the District Court was in the best position to hear all of the evidence presented and weigh conflicting testimony . . . It is not the role of this Court to reweigh the evidence and substitute our judgment for that of the District Court under such circumstances.

In re M.M., A.D., and L.D., 274 Mont. 166, 171, 906 P.2d 675, 678 (1995).

This Supreme Court has also held:

> It is well established that in reviewing a district court's findings, this Court does not consider whether the evidence could support a different finding; nor does it substitute its judgment for that of the fact-finder regarding the weight given to the evidence. In re D.V., 2003 MT 160, ¶ 23, 316 Mont. 282, ¶ 23, 70 P.3d 1253, ¶ 23

> (citation omitted). It is the district court's responsibility to weigh the evidence presented and ascertain witnesses' corresponding credibility. In re K.S., 2004 MT 212, ¶ 20, 317 Mont. 88, 75 P.3d 325, ¶ 20.

In re K.J.B., 2007 MT 216, ¶ 23, 339 Mont. 28, 168 P.3d 629. In the case at bar, the Court held a contested Order to Show Cause hearing, and a contested adjudication hearing and heard testimony from five witnesses on behalf of DPHHS. At the adjudication hearing, the District Court took judicial notice of the prior testimony at the Order to Show Cause hearing. DPHHS then presented testimony regarding the parents' lack of progress in addressing the needs for further DPHHS and Court involvement through the testimony of the mother, the Family Support Worker, the Child Protection Specialist, and the GAL. In the six and one-half months of DPHHS involvement, the parents made no progress on addressing: domestic violence, lacking parenting skills, or illegal drug use.

## IV. THE MOTHER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED AND CUMULATIVE ERROR DID NOT OCCUR.

The mother also attempts to argue that the District Court's decision to deny the father's motion to dismiss, and the decisions that followed, led to the termination of her parental rights, which was reached through cumulative error. What the mother fails to acknowledge is that it was her voluntary actions, in using illegal drugs and failing all aspects of her court ordered treatment plan, that led to the termination of her parental rights. The mother attempts to place blame on the

District Court for her own failures. The only person to blame, in this case, is the mother for failing to address the reasons she cannot safely parent C.A.D. III.

While parents have a fundamental interest in the care and custody of their children, this does not give parents a license to put their children at risk. Mont. Code Ann. § 41-3-101 (2007) provides in pertinent part that:

> (1) It is the policy of the state of Montana to:
>
> (a) provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for the children's care and protection.
>
> . . . .
>
> (e) ensure that all children have the right to a healthy and safe childhood in a permanent placement;
>
> . . . .
>
> (4) In implementing the policy of this section, the child's health and safety are of paramount concern.

The district court was required to consider the parents' rights, while keeping in mind the child's health and safety. In the seventeen months that this court case was pending, J.K. did not take one step to address the reasons why C.A.D. III was removed, adjudicated, and not allowed to return to his parents' care. The district court's decision to terminate J.K.'s parental rights was in concert with the policies of the State of Montana and was made with respect to the child's rights to a "healthy and safe childhood in a permanent placement." (Id.) This Court has

addressed the balancing of the parents' rights against the child's best interests, and has held:

> The district court is bound to give primary consideration to the physical, mental and emotional conditions and needs of the children. Consequently, the best interests of the children are of paramount concern in a parental rights termination proceeding and take precedence over the parental rights.
> Section 41-3-609(3), MCA.

In re V.F.A., 2005 MT 76, ¶ 8, 326 Mont. 383, 109 P.3d 749. Therefore, based on the facts of this case, the policy of the State of Montana, and the holdings of this Supreme Court, the mother's argument regarding an alleged violation of her Constitutional rights must fail.

## V. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT THE STATE HAD PROVEN THE CRITERIA REQUIRED TO TERMINATE THE MOTHER'S PARENTAL RIGHTS.

### A. The Mother's Treatment Plan Was Appropriate.

The Mother's treatment plan only contained basic tasks to ensure her child's safety and set forth specific timelines. The treatment plan mirrored the same tasks that the mother agreed to complete during her two VPSA's and when she stipulated to EPS and TIA. (2/5/10 Tr. at 189.) The treatment plan was geared towards three common and consistent goals: addressing domestic violence, drug dependence and alcohol abuse, and inadequate parenting skills. While no bright line definition of

an appropriate treatment plan exists, this Court established a test to measure appropriateness, holding: "[W]e consider a number of factors including: whether the parent was represented by counsel, whether the parent stipulated to the plan, and whether the plan takes into consideration the particular problems facing both the parent and the child." In re D.B., 2007 MT 246, ¶ 31, 339 Mont. 240, 168 P.3d 691 (citing In re A.N., 2000 MT 35, ¶¶ 26-27, 298 Mont. 237, 995 P.2d 427).

It is undisputed that J.K. was represented by counsel throughout these proceedings, and that she stipulated to the treatment plan. On April 29, 2009, J.K. and her attorney signed DPHHS's proposed treatment plan. She specifically agreed that the terms of the plan were appropriate. (D.C. Doc 59.) Her treatment plan was then court-ordered on May 11, 2009. At no time throughout the proceedings, prior to the termination hearing, did J.K. raise the argument that her treatment plan was inappropriate.

J.K. attempts to argue that she is "disabled" and therefore, that the treatment plan she agreed to complete, was inappropriate. She also attempts to argue that the treatment plan did not take into account C.A.D. III's special needs. No testimony was presented that supports either J.K.'s alleged disability, nor any diagnosis of C.A.D. III as having special needs, that would warrant a modified treatment plan.

J.K. cites four cases in an attempt to support her theory. But, unlike the cases J.K. cites, she is not diagnosed with a disability that would limit her

understanding of the treatment plan she agreed to complete. The cases cited by J.K. are easily distinguishable from J.K.'s situation. In In re D.B., the mother was diagnosed with "mild to moderate cerebral dysfunction" resulting in "severe deficits in vocabulary and auditory learning skills, and milder deficits in visual learning and interpretation of social cues." As a result, the psychologist who evaluated the mother "recommended additional services that CFS could provide to C.B. to address her individual needs." D.B., ¶¶ 12-13. In In re J.B.K., the mother suffered from a mental disability which required providing information to her in specialized ways. J.B.K., 2004 MT 202, 322 Mont. 286, 95 P.3d 699. In In re K.J.B., the mother suffered from a "chromosomal abnormality" which caused "physical and cognitive difficulties and developmental delays." K.J.B., 2007 MT 216, ¶ 3, 339 Mont. 28, 168 P.3d 629. In In re M.M., 271 Mont. 52, 894 P.2d 298 (1995) the father was diagnosed with borderline intellectual functioning which limited his ability to understand.

In the case at bar, J.K. does not have a disability, other than Dr. Silverman's impression that she operated on the level of "an immature adolescent." (2/5/10 Tr. at 17.) The only disorder that Dr. Silverman diagnosed J.K. with, was marijuana abuse. (2/5/10 Tr. at 30.) In fact, J.K.'s own testimony at the termination hearing throws into question her claims on appeal that she had difficulty comprehending what was required of her in a treatment plan. She testified that she was in the

process of completing her GED at the Salish Kootenai College. (2/5/10 Tr. at 202.) She testified that she had taken an exam and it was shown that she had "no problems at all" with reading and comprehension. (2/5/10 Tr. at 202-03.) She testified that she had memorized the telephone number for Family Concepts. (2/5/10 Tr. at 213.) She testified that she sought out and read magazine articles regarding childhood development. (2/5/10 Tr. at 217-19.) She went through her treatment plan tasks, step by step, on direct exam and demonstrated no sense of confusion over what was asked of her. (2/5/10 Tr. at 203-31.)

J.K.'s arguments contradict one another. She argues, on the one hand, that she was disabled and could not comprehend her treatment plan. (App. Br. at 26.) Then, when attempting to argue that the State did not prove her conduct was likely unable to change within a reasonable amount of time, J.K. argues that she does not suffer any mental disability. She states: "While Silverman recommended personal psychotherapy, he did not make any specific findings that J.K. suffered any kind of mental illness or deficiency." (App. Br. at 32, citing 2/5/10 Tr. at 20.) J.K. cannot have her argument both ways. J.K. was clearly not disabled and her treatment plan was appropriate.

While J.K. clings to Dr. Silverman's suggestion that she could benefit from a residential program such as the Carol Graham Home in Missoula, DPHHS provided her many services to ensure she was receiving the hands-on parenting

training that Dr. Silverman recommended. (2/5/10 Tr. at 147.) Jake Leeper testified that the staff at Family Concepts employed a hands-on approach during J.K.'s supervised visits. He explained:

> They [Family Concepts staff] would work on those things during visitations, particularly parenting, coaching, and redirection. If they saw some sort of inadequacy, they would help her ameliorate that and give her ideas on how to address that. That's why visitation is so important in this case.

(2/5/10 Tr. at 148.) Mr. Leeper further testified, with regard to visitation and hands-on parenting coaching, that: "the Department made the opportunities available to her but there were a number of missed visits and that she wasn't able to get that service." (2/5/10 Tr. at 147.) J.K. only attended 50 to 60 percent of her scheduled visitations. (2/5/10 Tr. at 157.)

By the time Dr. Silverman's evaluations were complete, the child had been out of his parents' home, and in the same foster home, for over a year. Dr. Silverman testified regarding his concerns for the child, and the child's needs for attachment as follows:

> The child, I believe, had been with the foster parents for over- -about a year . . . The child had engaged- -we did know the child had engaged in behaviors that were consistent with attachment problems. And, as a general conclusion, it was reasonable to conclude that the child would have formed an attachment with the new caregiver who has been consistently
> in that child's life.

(2/5/10 Tr. at 51.) Clearly, while Dr. Silverman made a recommendation

that the mother might benefit from a program such as Carol Graham, this would not have been in C.A.D. III's best interests and it was reasonable for the Department not to implement that particular recommendation. The Department did pay heed to Dr. Silverman's recommendations and conclusions, and ensured that J.K. was receiving hands-on parenting coaching, as a result. Sadly, she was not consistent in attending visits. If she did not benefit from the visitation services and was unable to complete parenting classes, it was her fault. J.K. cited no testimony that would support her claims that she and C.A.D. III had special needs that were not addressed in her treatment plan.

As this Court held in In re M.M., "while it is true that the State may assist a parent in completing the treatment program, the parent retains the responsibility for complying with the plan." 271 Mont. 52, 58, 894 P.2d 298, 302 (1995). In this case, J.K. is remiss to argue that the State did not do enough to assist her, when she did next to nothing to complete her treatment plan. During the termination hearing, J.K. was asked whether she understood that she had been court-ordered to obtain a chemical dependency evaluation in October, 2008. J.K. admitted that she remembered that. (2/5/10 Tr. at 237.) She also admitted that she did not obtain a chemical dependency evaluation until May 2009. (2/5/10 Tr. at 237-38.) She explained that:

> I guess I probably just wasn't really paying attention during the court hearings. I guess in some ways you could call me a blockhead because I do block out a lot of things that hurt emotionally and I guess it's just something I developed.

(2/5/10 Tr. at 238.) The mother also admitted that, although the father's rights had previously been terminated, she continued to reside with him. (2/5/10 Tr. at 238.)

While J.K. argues that she was given insufficient time to complete her treatment plan, the record is clear that J.K. was given ample time and opportunity to abrogate the need for out-of-home placement of her son. From the time J.K. agreed to complete a VPSA in January 2008, until the time J.K. stipulated to DPHHS involvement under Temporary Investigative Authority on October 22, 2008, J.K. agreed to address the two primary problems in her household: chemical dependency and domestic violence. In the 17 months of DPHHS involvement, she failed to do so.

### B. Sufficient Evidence Was Presented to Support the Court's Conclusion That the Mother's Conduct or Condition Rendering Her an Unfit Parent Was Unlikely to Change Within a Reasonable Time.

The District Court properly concluded that J.K.'s conduct or condition rendering her unfit was unlikely to change within a reasonable time, as is required by Mont. Code Ann. § 41-3-609(2), and which provides:

> In determining whether the conduct or condition of the parents is unlikely to change within a reasonable time, the

> court shall enter a finding that continuation of the parent-child relationship will likely result in continued abuse or neglect or that the conduct or condition of the parents renders the parents unfit, unable, or unwilling to give the child adequate parental care. In making the determinations, the court shall consider *but is not limited to the following:*
>
> . . . .
>
> (b) a history of violent behavior by the parent;
>
> (c) excessive use of intoxicating liquor or of a narcotic or dangerous drug that affects the parent's ability to care and provide for the child[.]

(Emphasis supplied.) Furthermore, Mont. Code Ann. § 41-3-609(3) provides:

> In considering any of the factors in subsection (2) in terminating the parent-child relationship, the court shall give primary consideration to the physical, mental, and emotional conditions and needs of the child.

In the present case, J.K. was diagnosed with cannabis dependence and had not completed chemical dependency treatment. J.K. argues that DPHHS did not present sufficient testimony to establish this fact. That is simply untrue. Dr. Silverman diagnosed J.K. as suffering from a disorder: marijuana abuse. (2/5/10 Tr. at 30.) Theresa Oakland, a licensed addictions counselor, also testified that she had diagnosed J.K. as cannabis dependent and as abusing alcohol. As J.K. points out, Ms. Oakland also testified that J.K.'s "recovery environment" was problematic in that she continued to reside with C.A.D. Jr., who actively used

marijuana and alcohol and that Ms. Oakland had discussed the importance of a recovery environment with J.K. (App. Br. at 33; 2/5/10 Tr. at 73.)

In addition, while J.K. was not herself violent, she continued to reside with C.A.D. Jr. even after he shoved her out of a moving vehicle with C.A.D. III in her arms. She testified that she did not believe C.A.D. Jr. was violent towards her. (2/5/10 Tr. at 224.) However, J.K. again contradicts her own testimony, by arguing the opposite on appeal, and stating:

> Although there were allegations of domestic violence in the home, J.K. was the victim, not the perpetrator of that violence. She cannot be held responsible for possible violence in the home as she herself was the victim of the alleged abuse.

(App. Br. at 33.) Appellate counsel argues that J.K. was indeed a victim of domestic violence, but fails to address the fact that she did not address the task in her treatment plan regarding domestic violence counseling. Once again, J.K. cannot have it both ways. J.K. was a victim of domestic violence, but did not admit this fact at any time in the proceeding. And because J.K. continued to reside with C.A.D. Jr., up to and including the time of the termination trial, clearly, domestic violence was a continuing concern regarding her ability to parent C.A.D. III. The presence of domestic violence is clearly a factor to consider when determining whether J.K.'s conduct or condition is able to change. She continued to reside with a violent parent, who had abused her in front of her son, and whose actions posed a serious risk of harm to C.A.D.

III. Montana Code Annotated § 41-3-102(23)(b) does not address the likelihood of further acts of domestic violence. Rather, Mont. Code Ann. § 41-3-609(2)(b) provides this as a method of determining a parent's future ability to adequately parent.

As this Court has held on numerous occasions: "because we cannot see into the future to determine whether a parent's conduct is likely to change, that determination must, to some extent, be based on the parent's past conduct." In re C.J.K. 2005 MT 67, ¶ 24, 326 Mont. 289, 109 P.3d 232 (citing In re M.R.G., 2004 MT 172 ¶ 31, 322 Mont. 60, 97 P.3d 1085) . In seventeen months, J.K.'s conduct remained the same.

### C. J.K. Agreed to Complete Her Treatment Plan and Failed to Object to the Treatment Plan as Inappropriate.

Although DPHHS believes the treatment plan for J.K. was appropriate, J.K. is barred from raising this argument on appeal, because at no time prior to the termination hearing, did she object to her treatment plan. Rather, J.K., through her court appointed counsel, stipulated to her treatment plan as being appropriate. (D.C. Doc 59.) J.K. should not be allowed to now argue that the plan was inappropriate. "Acquiescence in error takes away the right to objecting to it." In re A.A., 2005 MT 199, ¶ 26, 327 Mont. 127, 112 P.3d 993.

## CONCLUSION

J.K. did not address one concern that led to the removal of her son, and the involvement of DPHHS and the District Court, although she had 17 months to do so. Concerns included: illegal drug use and domestic violence. J.K.'s arguments ignore Montana law and attempt to place blame on the District Court for her own substantial problems, which make her unable to care for her child. C.A.D. III could not be raised in an environment that posed so many dangers to his well being. In addition, J.K.'s treatment plan was reasonable and appropriate. Finally, based on J.K.'s consistent problems with illegal drug abuse, lack of parental understanding, and her inability to remove herself from a household environment of domestic violence, it is clear that the conditions rendering her unfit are unlikely to change within a reasonable amount of time. The District Court's orders should be affirmed.

Respectfully submitted this 16th day of June, 2010.

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## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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